Book Reviews

COMMON LAW CONSTITUTIONAL INTERPRETATION: A CRITIQUE

THE LIVING CONSTITUTION. By David A. Strauss.[1] Oxford University Press. 2010. Pp. xviii + 150. $21.95 (cloth).

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INTRODUCTION

Advocates for some form of original understanding as *the* proper means for interpreting the Constitution managed to set the terms of the interpretive debate for nearly the last three decades. In part, their success is due to the perception that "it takes a theory to beat a theory."[3] Indeed many liberal legal scholars, Jack Balkin most recently, have simply decided to beat originalists at their own game by invoking history to justify Supreme Court decisions thought to be beyond redemption as a matter of original understanding.[4] Paraphrasing Jefferson, then, are we all originalists now?[5] David Strauss's *The Living Constitution* answers with a resounding *No!*

Since the 1996 publication of his article, *Common Law Constitutional Interpretation*,[6] Strauss has labored to create an

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3. For a version of this argument, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989).

4. *See, e.g.*, Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

5. *Cf.* Thomas Jefferson, First Inaugural Address (Mar. 14, 1801), *in* 1 INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 19 (2000).

6. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L.

alternative to originalism. In a series of articles, he argued that constitutional interpretation emulating the common law method (hereinafter "common law constitutional interpretation" or "CLCI") is superior to originalism, both normatively and as a description of what the Court, in fact, does in most cases.[7] *The Living Constitution* synthesizes his writings and provides, with admirable brevity, an interpretive alternative to originalism. After Strauss, no one can say that originalism's opponents lack a theory. The question rather is whether CLCI "beats" originalism by compensating for the latter's shortcomings without proving to have theoretical shortcomings itself.

As I argue below, I think that Strauss's case falls short. He devotes little space to explaining what, exactly, CLCI is and how it should be applied by courts. Strauss then contrasts CLCI with a caricatured originalism that bears little resemblance to the sophisticated theories of original understanding propounded by scholars today. In Part II, I offer my critique. Specifically, I question some of the assumptions underlying CLCI, note the absence of any definition of the "common law method," and argue that his objections to originalism are not particularly persuasive. Ultimately, I conclude that we do not have enough information about CLCI to determine whether it is, in fact, superior to theories of original understanding (as opposed to the straw-man version of originalism Strauss offers) in most cases. A brief conclusion follows.

I. THE CASE FOR COMMON LAW CONSTITUTIONAL INTERPRETATION

Strauss lodges two main objections to originalism—the *undesirability objection* and the *impossibility objection*. Originalism is normatively undesirable because what we know the Framers *did* intend is morally or politically unacceptable to twenty-first century Americans. Originalism also requires submission to the (often morally inferior) choices of men long-dead and is undesirable for that reason as well.

REV. 877 (1996).

7. David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845 (2007); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003); David A. Strauss, *Freedom of Speech and the Common-Law Constitution, in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 32 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

Originalism, moreover, is impossible because (1) it is beyond the capacity of judges to discern what the Framers and Ratifiers understood the words of the Constitution to mean; and (2) even if judges could, they could not use those meanings to decide contemporary constitutional controversies. Because originalism is impossible, Strauss argues that judges who claim to employ originalism are simply reading their policy preferences into the Constitution.

In contrast to originalism, Strauss argues that CLCI is workable, justifiable, descriptively superior, and candid. His theory is *workable* because it is within the capacity of judges. CLCI is *justifiable* because it relies on something other than blind obedience to the past. Further, he argues, it is *descriptively superior* because it reflects what the Court does and has done—thus giving a better account of Court practices than originalism. It is, he avers, the only source for *real* constitutional change in our system. Finally, he argues that CLCI beats originalism on *candor* because his theory is transparent and honest, as opposed to opaque and obfuscatory—characteristics Strauss ascribes to originalism.

A. THE UNDESIRABILITY OBJECTION

Originalism is defined by Strauss to be "the view that constitutional provisions mean what the people who adopted them—in the 1790s or 1860s or whenever—understood them to mean" (p. 3). Originalism, Strauss argues, "is not consistent with principles that are at the core of American constitutional law, and, for the most part, originalists do not claim otherwise" (p. 17).[8] On cue, Chapter 1 issues forth a parade of horribles—"what we would have to give up if we were all to become originalists" (p. 12):

- "*Racial segregation of public schools would be constitutional.*" (p. 12).
- "*The government would be free to discriminate against women.*" (p. 13).
- "*The federal government could discriminate against racial minorities (or anyone else) pretty much any time it wanted to.*" (p. 14).
- "*The Bill of Rights would not apply to the states.*" (p. 15).

8. By "American constitutional law," of course, Strauss means the law as interpreted by the United States Supreme Court.

- "*States could freely violate the principle of 'one person, one vote' in designing their legislatures*." (p. 15).
- "*Many federal labor, environmental, and consumer protection laws would be unconstitutional.*" (p. 16).

Strauss also objects that originalism violates Jefferson's injunction that the earth belongs to the living. "One generation," he writes, "cannot bind another" (p. 24). "Why should we be required to follow decisions made hundreds of years ago by people who are no longer alive?" (p. 18). Twenty-first century Americans have little in common with their ancestors of two centuries past—in fact, we have more in common with "present-day residents of New Zealand[,] . . . [b]ut it would be bizarre to suggest that we should let the people of New Zealand decide fundamental questions about our law" (p. 24). So "[w]hy do we submit to the decisions of the much more distant and alien founders" (p. 24)? Strauss rejects any answer that depends on "quasi-religious notions like fidelity," and he argues instead that we should "adapt[] the Constitution to modern circumstances" when such adaptation is required (pp. 24–25). To the extent originalism would prevent this, he argues that Jefferson's objection is "ultimately fatal to originalism" (p. 25).

B. THE IMPOSSIBILITY OBJECTION

Equally flawed, for Strauss, is originalism's methodology. "On the most practical level," he writes, "it is often impossible to uncover what the original understandings were . . . ." (p. 18). To be done correctly, originalism means "judges have to be historians"—better, in fact, because historians get to choose what period of time that they study (p. 19). Lawyers and judges "have no apparent qualifications for it," and "there is no reason to think that lawyers will be good at understanding the political culture of a distant century" (p. 20). More often, lawyers and judges produce law office history by picking and choosing among uncertain evidence and seeing in it "what the judge wants to see" (p. 20). By contrast, CLCI "requires judges and lawyers to be, well, judges and lawyers" (pp. 43–44).

But even if history is available to judges and justices, it is not much help because "we would be faced with the task of translating those understandings so that they address today's problems" (p. 18). For example, Strauss asks about the Equal

Rights Amendment to the Constitution (ERA):[9] "Would the ERA have abolished all-girls and all-boys public schools? Would it have required public employers to give women pregnancy leave?" (p. 19). He claims that no "'understanding' emerged on questions like these. And if we cannot identify clear understandings about something so recent, we have very little chance of accurately uncovering the original understandings of something like the Bill of Rights" (p. 20).

The inability of originalism to deliver what it promises means that judges who purport to use originalism to fix constitutional meaning are relying on something else—their own values and preferences. Strauss assumes, for example, that *Heller*[10] can be explained not as a good faith disagreement over ambiguous historical evidence but only as Justices invoking history as a fig leaf to support their preferred policy positions on gun control (pp. 20–21). Originalism, he concludes, "is not actually a way of interpreting the Constitution. It is a rhetorical trope" but one that has thrived for lack of a competitor (p. 31).

C. THE SUPERIORITY OF CLCI

Strauss argues that the Supreme Court does not usually decide constitutional cases by a close reading of the text and careful dissection of competing historical claims about textual meaning. Rather, the Justices debate what prior cases require (pp. 33–34). This common law approach is one "in which precedents evolve, shaped by notions of fairness and good policy" (p. 36). Strauss maintains that CLCI restrains judges better than originalism (p. 36). In addition, he offers four reasons to prefer CLCI to originalism: workability, justifiability, descriptive superiority, and candor (pp. 43–44).

1. *Workability*—CLCI answers the impossibility objection to originalism by embracing an interpretive method that is within the professional competence of lawyers and judges. Unlike originalism, Strauss argues, CLCI is workable because it only requires judges and lawyers to be judges and lawyers instead of historians (p. 43). "Reasoning from precedent, with occasional resort to basic notions of fairness and good policy, is what judges

9. The ERA provided that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong. (1972).

10. District of Columbia v. Heller, 554 U.S. 570 (2008) (invalidating D.C. gun control ordinance on Second Amendment grounds).

and lawyers do" (p. 43). It is, he argues, their comparative advantage, not doing history. CLCI also answers part of the undesirability objection—that originalism would produce unacceptable results—because CLCI permits the introduction of contemporary values necessary to update or "modernize" the law.[11]

2. *Justifiability*—For Strauss, CLCI also answers another aspect of the undesirability objection to originalism: that it requires subordination of the present to the dead hand of the past. "The common law ideology gives a plausible justification for why we should follow precedent" (p. 43). Instead of rooting its authority in the command of some sovereign, the authority of law under the common law approach "comes instead from the law's evolutionary origins and its general acceptability to successive generations. Legal rules that have been worked out over an extended period can claim obedience for that reason alone" (pp. 37–38). The common law, in other words, can be thought to embody the wisdom of the ages, as adjusted from time to time by contemporary injections of "fair[ness]" or "good social policy" (p. 38). By contrast, originalists "do not have an answer to Jefferson's question: why should we allow people who lived long ago, in a different world, to decide fundamental questions about our government and society today?" (p. 44).

3. *Descriptive Superiority*—CLCI, not originalism, Strauss argues, represents the dominant mode of Supreme Court decision-making. Most of the constitutional principles we take for granted today came because the Court *ignored* original intent. "In controversial areas at least . . . the governing principles of constitutional law are the product of precedents, not of the text or the original understandings. And in the actual practice of constitutional law, precedents and arguments about fairness and social policy are dominant" (p. 44).[12] In Chapter 3,

11. *Cf.* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859 (2009).

12. Strauss also notes that these important changes came as a result of judicial decision-making, *not* constitutional amendment, leading him to conclude that formal amendments "are actually not a very important way of changing the Constitution" (p. 115). He notes that the most important changes—flow of power to the federal government, the rise of the administrative state, growth of presidential power—have occurred in the absence of formal language in the Constitution (pp. 120–21). Moreover, occasionally formal amendments have failed to produce the changes anticipated. The Civil War amendments, for example, were all but moribund for decades after their ratification (p. 127). Formal amendments are, in his estimation, neither necessary nor sufficient to produce small-*c* constitutional change. The Court's exercise of judicial review is the dominant mode of constitutional change, he argues. For a longer version of

for example, Strauss takes the reader on a Cook's Tour of First Amendment doctrine from the World War I-era Espionage Act cases[13] to the *Pentagon Papers* case[14] (pp. 62–75) to illustrate that "[t]he law of the First Amendment is a creation of the living Constitution" (p. 76). "The central features of First Amendment law were hammered out in fits and starts, in a series of judicial decisions and extrajudicial developments, over the course of the twentieth century" (p. 53). Concern with original intent is noticeably absent in much First Amendment case law, he argues: "[T]he text and the original understandings of the First Amendment are essentially irrelevant to the American system of freedom of expression as it exists today" (p. 55).[15]

4. *Candor*—Finally, Strauss argues that CLCI "is more candid" than originalism (p. 44). "The common law approach explicitly envisions that judges will be influenced by their own views about fairness and social policy" and that they have "operated that way for centuries" (p. 45). He denies this means that "judges can do what they want," because they can only operate in "the area left open by precedent, or in the circumstances in which it is appropriate to overrule a precedent" (p. 45). Originalists say that such appeals to judges' personal values are illegitimate; "[a]n originalist has to insist that she is just enforcing the original understanding of" the constitutional provision she happens to be interpreting (p. 45). But this, he argues, "is an invitation to be disingenuous," because of the impossibility objection described above (p. 45). Many controversial provisions are indeterminate and "it will be difficult for any judge to sideline his strongly held views about the issue" (p. 45).

his argument, see Strauss, *The Irrelevance of Constitutional Amendments*, *supra* note 7. For a reply, see Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247 (2002).

13. *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919).

14. N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

15. For example, though addressed to "Congress," the First Amendment applies to the states and to the federal executive and judicial branches (p. 56). *See, e.g.*, Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156 (1986). Moreover, historians have argued for decades over whether the freedom of speech protected by the Amendment extended only to seditious libel (pp. 58–59). *See generally* DANIEL A. FARBER, THE FIRST AMENDMENT 8–13 (3d ed. 2010) (providing a brief overview of historical debates surrounding the purpose of the Amendment).

D. AN ANTICIPATED OBJECTION AND A CONCESSION

In laying out the case for CLCI, Strauss anticipates one objection to his method: that it is anti-democratic. He also concedes that CLCI does not render either text or history *entirely* irrelevant to constitutional law; it just does so for the most controversial issues.

Strauss acknowledges that an obvious difference between the traditional common law method and CLCI is that when courts render decisions applying the former, legislatures are free to overrule them by statute. "A decision about the meaning of the Constitution, by contrast, cannot be reversed by Congress or a state legislature; it can only be undone if the courts change course, or if the Constitution is formally amended . . . ." (p. 46). He denies that this charge of CLCI being anti-democratic is a "fatal defect" in his theory (p. 46). The problem, as he sees it, is not CLCI, but judicial review itself, "the practice of allowing the courts to have the last word on most issues of constitutional law" (p. 47). Further, there is the Constitution, which, by design, "will sometimes prevent the majority from having its way . . . ." (p. 47).

For Strauss, once you accept constitutionalism, and the role of the Supreme Court in settling disputes over its meaning, the anti-democratic or counter-majoritarian charge loses much of its force. "The common law is not intrinsically democratic or undemocratic; it is a way of resolving legal issues" (p. 47). Moreover, it is a way of resolving legal issues in the here and now, involving new questions not previously considered. Originalism is not any more democratic, he argues, because it requires present-day majorities to submit themselves to the rule of the long-dead. "Apart from that," Strauss adds, "originalist judges have to decide what those people's will was about issues that the people could not have anticipated—and that leaves plenty of room for undemocratic rule by judges" (p. 49). He adds, for good measure: "in any event, we do not have a purely democratic system. We have a system in which the courts, applying the Constitution, sometimes prevent the majority from having its way" (p. 49).

Strauss concedes that text and history *are* sometimes important—decisive even—in fixing constitutional meaning. CLCI, in other words, does not mean that courts would be free to "interpret[]" the age limits for elected officials to mean

something other than the age given in the Constitution[16] (p. 103). He accepts that "one of the absolute fixed points of our legal culture is that we cannot" simply ignore constitutional text (p. 103). "We cannot make an argument for any constitutional principle without purporting to show, at some point, that the principle is consistent with the text of the Constitution" (p. 103). He devotes Chapter 5 to resolving this paradox: "a dynamic common law constitution, and an unchanging but centrally important text?" (p. 99).

Strauss argues that the text is important because "it provides a common ground among the American people, and in that way makes it possible for us to settle disputes that might otherwise be intractable and destructive" (p. 101). The Constitution settles any number of important issues regarding the structure of the government and the existence of certain individual rights that serve as starting points for debate. "The central idea is . . . that sometimes it is more important that matters be settled than that they be settled right" (p. 104). In other words, text sometimes narrows or cabins the extent of our disagreements with one another. So "the practical judgment that following this text, despite its shortcomings" and not acquiescing to dead hand control or even ancestor worship of the Framers is why we follow the Constitution (p. 105).

In accordance with his "common ground" justification for following the text, "the words of the Constitution should be given their ordinary, current meaning—even in preference to the meaning the framers understood" (p. 106). To do otherwise would invite disagreement over the Framers' understandings of particular words, which, in turn, would frustrate the reason for consulting the text—to narrow areas of disagreement and to provide a focal point around which what Cass Sunstein called "incompletely theorized agreements" could coalesce[17] (pp. 106, 111). In other words, Strauss would like the text to "matter[] most for the least important questions" (p. 110).

Using original understandings of provisions, moreover, robs the Constitution of its particular genius, which for Strauss is that

16. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 2 ("No person shall be a Representative who shall not have attained to the age of twenty five years . . . ."); p. 103 ("No one seriously suggests that the age limits specified in the Constitution for presidents and members of Congress should be interpreted to refer to other than chronological (earth) years because life expectancies now are longer . . . .").

17. *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733 (1995).

the document "is specific where specificity is valuable and general where generality is valuable . . ." (p. 112). It seems, in other words, to invite the very common law approach that he advocates. Originalism, on the other hand, "take[s] general provisions and make[s] them specific," ignoring "the framers' genius . . . in their ability to leave provisions general . . . so as not to undermine the document's ability to serve as common ground" (p. 113–14).

II. PROBLEMS WITH COMMON LAW CONSTITUTIONAL INTERPRETATION

In this Part, I lodge four related objections to Strauss's theory. First, Strauss's references to the "common law method" are very general; it is not clear, exactly, what is involved in common law constitutional interpretation, or how we are to evaluate whether it is being done well or poorly by judges. Second, Strauss assumes, but does not defend, judicial supremacy. That assumption, in turn, allows him to sidestep the critique that the common law is a poor model for the Supreme Court because its decisions may not be reversed by ordinary legislative majorities. Third, the originalism with which Strauss contrasts CLCI is a caricature. No originalist of whom I'm aware holds the views Strauss ascribes to originalism. Further, Strauss's undesirability and impossibility objections to originalism are either unpersuasive or overdrawn. The lack of a fine-grained discussion of the common law method and his straw-man originalism, in turn, make it difficult to say with any certainty whether CLCI beats originalism (or any other theory) according to Strauss's own criteria.

A. WHAT *IS* THE "COMMON LAW METHOD"?

Strauss describes the common law as a system "in which precedents evolve, shaped by notions of fairness and good policy" (p. 36). It develops "over time, not at a single moment; it can be the evolutionary product of many people, in many generations" (p. 37). Its legitimacy stems from its "evolutionary origins and its general acceptability to successive generations" (pp. 37–38).[18] The common law, he adds, "emerges from this

18. Another of Strauss's assumptions is that the common law embodies a kind of wisdom of the ages (p. 44). As Adrian Vermeule demonstrates in a book-length critique of common law constitutional interpretation, though, these assumptions are highly questionable. *See* ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON (2009).

evolutionary process through the development of a body of precedents" (p. 38). Where precedents don't supply a clear answer "the judge will decide the case before her on the basis of her views about which decision will be more fair or is more in keeping with good social policy" (p. 38). The common law method requires the embrace of "humility and cautious empiricism" on the part of judges (p. 40). "[W]hile the common law does not always provide crystal-clear answers, it is false to say that a common law system, based on precedent, is endlessly manipulable" (p. 43).

Describing precedents as "evolving" and resulting principles emerging from an "evolutionary process" make judges sound almost passive, except when applying a dollop of fairness and good policy in situations the precedents don't address. But the analogy to evolution surely obscures more than it illuminates.[19] Strauss never really tells us what this process of evolution looks like or the judge's role in it. Nor does he give clear indications when precedents should be regarded as inapplicable, so that a judge is free to fall back on her sense of fairness and good policy. Compare Strauss's silence to Edward Levi's description of the common law system: "the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation."[20] Levi leaves no doubt that there is human agency in this process. As Benjamin Cardozo wrote, "We do not pick our rules of law full-blossomed from the trees."[21]

Cases and principles don't spontaneously "evolve." Judges and justices, for example, must frame the legal issues; decide which cases are relevant to those issues; decide what those cases

19. Adrian Vermeule, *Living it Up*, THE NEW REPUBLIC (Aug. 2, 2010), http://www.tnr.com/book/review/living-it (book review of GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION (2010); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010)). In his review, Adrian Vermeule dismisses it out of hand, to the extent that Strauss truly intended to analogize common law decision-making to biological evolution. "Constitutional Darwinism is a non-starter. . . . [T]he process by which constitutional precedents are selected for ongoing life, or instead for overruling and death, cannot plausibly be described as a form of natural selection." *Id*. *See also* Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319 (2008) (illustrating the weaknesses of the metaphor). Vermeule, however, gives Strauss the benefit of the doubt, suggested that Strauss likely "intends to suggest that constitutional law is intentionally adapted to changing circumstances through incremental improvements by successive generations of judges. This constitutional Burkeanism," he concludes, "is a more serious business, and Strauss's view is entirely plausible." Vermeule, *supra*.

20. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1972 ed.).

21. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 103 (1921).

say; distinguish or overrule cases that point towards a different answer or choose among lines of doctrine that might be in tension. Just as judges and lawyers can disagree over the conclusions to be drawn from sources of original understanding, those attempting CLCI can disagree over the meaning of prior cases and the proper level of abstraction at which those principles should be derived. The answer to the next case is often not found in the prior case. As Charles Fried put it,

> [P]articularistic decisions, moved by the force of urgent specifics, may for a time exert their influence in a case-by-case accretion of precedents in similar circumstances, but their influence cannot forever be exerted in this sideways fashion. Eventually they either run out, or, if potent, they invite courts to move to higher levels of abstraction, where more general propositions are announced, and it is these that begin to take over some of the work of deciding cases.[22]

Because Strauss wants to convince readers that the common law system "restrains judges more effectively than originalism does" (p. 36), he seems deliberately to downplay the significant discretion that judges have to interpret precedent, derive rules of law from prior cases, cast them at a particular level of abstraction, and apply them to controversies before them. Alternatively, without overruling a prior case apparently on point, a court can, as Karl Lewellyn pointed out, distinguish the prior case by pointing to differences in the facts.[23] He called this "strict view" of precedent humorous, illustrating the concept by reference to a case expressing a "rule hold[ing] only of redheaded Walpoles in pale magenta Buick cars."[24] He contrasted his strict view of precedent with a "*loose view*,"[25] which was:

22. CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 189 (2004).

23. K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 65–66 (10th prtg. 1996 ed.). Llewellyn wrote:

> [I]t is clear that if a later court, in pondering a case substantially equivalent, does not like the results achieved by the earlier court, then it may reach a contrary decision in either of two ways. Either it may reject the rule laid down by court number one; and this is not so likely. Or it may accept that rule as a verbal formula, may cite the prior case as authority, and yet interpret the raw evidence before it differently, saying that due to the difference in the facts, the rule does not apply.

Id.

24. *Id.* at 72–73.

25. *Id.* at 74 (emphasis in original).

> [T]he view that a court has decided, and decided author–itatively, *any* points or all points on which it chose to rest a case, or on which to chose [sic], after due argument, to pass. No matter how broad the statement, no matter how unnecessary on the facts or the procedural issues, if that was the rule the court laid down, then that the court has held.[26]

Llewellyn emphasized that the strict and loose views of precedent were employed by lawyers and judges at the same time to "get[] rid of precedents deemed troublesome and . . . for making use of precedents that seem helpful."[27]

Strauss's defense of *Roe v. Wade*[28] in Chapter 4 is an example of his quietism about the common law method. "A plausible, precedent-based, common law case can be made for a woman's right to reproductive freedom," he writes (p. 94). First, he says, tradition holds that "people have the right to bodily integrity" as well as "the right to control the composition of one's family" absent "extraordinary circumstances" (p. 94). "Both these traditions reach far back into American law" (pp. 94–95). Because "it would hardly be controversial for the Supreme Court to hold that the government may not invade individuals' bodily integrity by conducting medical experiments on people against their will," and because "a law that specified that women of child-bearing age must become pregnant, if they are physically able to do so, would . . . rais[e] serious constitutional issues," despite the absence of language in the Constitution prohibiting such laws, *Roe* is explicable by those twin traditions of bodily integrity and the right to family composition (p. 95). *Q.E.D.*

One problem, of course, is that is *not* how *Roe* "evolved." According to the *Roe* Court, the right to abortion was an aspect of a larger "privacy" right that originated in *Griswold v. Connecticut*.[29] But the right annunciated in *Griswold* seemed inextricably linked to marriage.[30] It was *Eisenstadt v. Baird*[31] that

26. *Id.* (emphasis in original).
27. *Id.*
28. Roe v. Wade, 410 U.S. 113 (1973).
29. Griswold v. Connecticut, 381 U.S. 479 (1965).
30. Justice Douglas's opinion, for example, closed with the observation that the case dealt with "a right of privacy older than the Bill of Rights" and referred to marriage "as a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.* at 486. Earlier, he wrote that "the very idea" of permitting "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives" was "repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 485–86.
31. Eisenstadt v. Baird, 405 U.S. 438 (1972).

severed the link between the privacy right and the marriage relationship. Striking down Massachusetts' prohibition on the distribution of contraceptives to unmarried persons (note the difference between that law and the ban in *Griswold* on the *use* of contraceptives), Justice Brennan wrote that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and married alike. . . . If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear *or beget* a child."[32]

Not only did *Eisenstadt* recast *Griswold* as a case about individual rights, it recharacterized the right itself more broadly—as a right of privacy that encompassed not merely the right to make choices about becoming pregnant, but also the right to bring a pregnancy to term or not. The Court never explained why something that was true for married couples must be *ipso facto* true for unmarried individuals. Nor did it justify the expansion of the privacy right itself. As Charles Fried has noted, *Eisenstadt* "casually slips in the word 'bear,' and so alludes to the quite different and much more controversial issue of abortion."[33] *Roe* itself then made use of "the subterranean passage Justice Brennan had dug between contraception and abortion"[34] further expanding the privacy right in question, and holding that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment[] . . . [or] in the Ninth Amendment . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[35] As Fried notes, "[j]ust what authority the Court was claiming for itself in *Roe v. Wade* and in the name of what doctrine is hard to tell."[36] Whatever it was, though, the decision and its reasoning was "a long way from the truly anomalous Connecticut statute in *Griswold.*"[37] The actual story of *Roe* must stand as a warning to anyone inclined to take seriously Strauss's assurances about the constraining effects of precedent and CLCI.[38]

32. *Id.* at 453 (emphasis added).
33. FRIED, *supra* note 22, at 191.
34. *Id.*
35. Roe, 410 U.S. at 153.
36. FRIED, *supra* note 22, at 193.
37. *Id.*
38. Nor is *Roe* necessarily an anomaly. Cases in less controversial areas than abortion demonstrate how loosely cases can bind the Court. In *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), for example, the Court invalidated a California law that

So much for how *Roe* actually came about. What about Strauss's attempt to shore up *Roe*'s foundation by reconstructing it upon alleged legal "traditions" of bodily integrity and the right to control family size? Strauss's effort illustrates the point that I'm making here: that his theory lacks an account of how to choose among competing traditions (or lines of precedent) and the appropriate level of abstraction at which to cast whatever tradition or precedent is chosen.

I can think of at least four exceptions to the bodily integrity and the controlling-family-size traditions Strauss invokes. First, there is the Draft. Government can require its (male) citizens literally to put their life on the line for the country or face imprisonment. Second is mandatory vaccination. In *Jacobson v. Massachusetts* the Court held that mandatory vaccination against smallpox violated neither the letter nor the spirit of the Constitution.[39] Rejecting the argument that the statute was an infringement of personal liberty guaranteed by the Fourteenth Amendment, the Court responded with a reference to conscription:

> The liberty secured by the 14th Amendment . . . consists, in part, in the right of a person 'to live and work where he will'; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under

required insurance companies doing business in the state to disclose Holocaust-era policies issued in Europe by companies or their affiliates. The Court found that the state law conflicted with the executive branch's policy that conflicts over such insurance policies be settled by an international commission. As Mike Ramsey and I showed, though, the cases cited in support of the Court's decision were distinguishable; moreover, the Court neglected to discuss relevant precedents that cut against its decision. Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 874–85 (2004). We concluded that "[t]he foreign affairs cases on which *Garamendi* purported to rely simply do not involve close readings of prior cases and applications of the existing rules and doctrines to new facts." *Id.* at 894. The case, we argued, was "powerful evidence that the Court's prior . . . decisions do not constrain it, or indeed even meaningfully inform its subsequent decisions." *Id.* at 896.

39. Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905) ("Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution.").

> the sanction of the state, for the purpose of protecting the public collectively against such danger.[40]

Though it is in bad odor, the Court has never formally overruled *Buck v. Bell*,[41] which rejected a constitutional challenge to forced sterilization of the "feeble-minded." Citing *Jacobson*, Justice Holmes wrote that "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes," adding infamously that "[t]hree generations of imbeciles are enough."[42] Finally, there is abortion itself: after viability (and even in the third trimester under the old *Roe* framework), states may proscribe abortion altogether (with exceptions to preserve the life and health of the mother), thus forcing a woman to bring the child to term and endure both the physical discomfort that attends the last weeks of pregnancy as well as the pain of birth. It is also worth noting that the statutes on the books limiting or banning abortions when *Roe* was decided constituted an additional exception to those traditions.

Given the existence of those exceptions, how is a judge supposed to choose among the competing traditions? Strauss's only response, repeated throughout the book, is that judges sometimes need to apply "fairness and good policy" to update the law (*e.g.*, pp. 36, 38). But how? If the choice among competing traditions is made by judges applying fairness and good policy, it is difficult to see how either precedent or CLCI constitutes even a mild fetter on the Court or how it provides transparency and candor as compared to originalism.

Given that Strauss seeks to prove the superiority of CLCI to originalism, it is surprising that he has so little to say about the mechanics of his methodology. Analogies and metaphors are no substitute for a careful description of the common law method itself and the judge's role in it. By *not* doing so, he leaves the impression it is something of "a machine that would go of itself," to borrow Michael Kammen's description of the Constitution,[43] whereby principles evolve and emerge ready-made for judicial application. When law runs out, well, the judge stands ready with fairness and sound policy, thereby moving the law *ad astra per*

40. *Id.* at 29–30 (citations omitted).
41. Buck v. Bell, 274 U.S. 200 (1927).
42. *Id.* at 207.
43. *See* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986).

aspera.[44] By glossing over the choices made in a common law system, Strauss makes CLCI sound like sweet reason itself, especially when compared to the caricatured originalism Strauss deploys as CLCI's foil.

B. IMPLICIT JUDICIAL SUPREMACY

CLCI is a theory that assumes judicial supremacy—that the Supreme Court is the authoritative interpreter of the Constitution and that its decisions bind other governmental actors, who are not free to adopt conflicting interpretations. As Adrian Vermeule put it in his review of Strauss's book, "Strauss has not fully worked through the basic question of why, under [CLCI], the legal system will work best overall if judges have the power to review and overturn legislative action" and that "constitutional theory should have better foundations than" the ones Strauss provides.[45] "Strauss describes the common-law method," Vermeule notes, "in terms that make it sound distinctively judicial."[46]

This assumption enables Strauss to sidestep a substantial objection to his theory: that the common law model is inappropriate in a system where judicial decisions are not amenable to reversal by ordinary legislative majorities. Because judicial decisions are a kind of one-way ratchet, one might argue that CLCI has undemocratic and counter-majoritarian effects. As noted above, however, Strauss's response is to shrug and say that if there is a problem it is with constitutionalism in general and judicial review in particular, not with CLCI.[47] But this response seems to conflate constitutionalism with *judicially-enforced* constitutions and judicial review with judicial supremacy. Strauss's theory places courts—the Supreme Court in particular—squarely in the interpretive driver's seat. As Vermeule suggests, Strauss assumes that readers will accept on faith that courts are better suited than other branches to perform this role.

CLCI's juriscentrism is confirmed by recalling Strauss's list of things that "we would have to give up if we were all to

44. The phrase is usually translated, "To the stars through adversity."

45. Vermeule, *supra* note 19. For a project similar to Strauss's, which does attempt a defense of strong-form judicial review, see DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW (2009). For Strauss's defense, see *supra* Part I.D.

46. Vermeule, *supra* note 19.

47. *See supra* Part I.D.

become originalists" (p. 12). Conceding that Strauss is right that the original understanding of the Constitution compelling those results,[48] however, would not mean that discrimination, malapportioned legislatures, or what have you would be fixed in the Constitution. At most it might mean that *courts* would be unable to effect changes. Federal, state, and local legislatures would be free to enact protections for groups not explicitly protected in the United States Constitution. For example, the Constitution has not been interpreted by courts to require barring employment discrimination based on sexual orientation; but state and local governments have stepped in to provide such protections.[49] In an earlier article, Strauss himself argued that even without the Fourteenth Amendment's Equal Protection Clause, race discrimination would likely have ended eventually anyway.[50] There is also the possibility that the Constitution would be amended to force change. Though Strauss argues that CLCI produces the only meaningful constitutional change in our system, evidence exists that Article V has provided meaningful, durable constitutional change in the past.[51] Moreover, it could be that in the absence of robust judicial review Article V would have produced more constitutional change than it has to date.

C. A CARICATURED ORIGINALISM

Strauss defines originalism as "the view that constitutional provisions mean what the people who adopted them—in the 1790s or 1860s or whenever—understood them to mean" (p. 3). Later, he claims that originalists "insist[] that the original understandings of constitutional provisions provide answers to every dispute about what the Constitution requires" (p. 25). Originalism, he writes elsewhere, confines us to the Framers' specific judgments, rather than "leaving [judges] free to interpret the [Constitution's] general provisions" (p. 114).

48. To take one example from his list, conventional scholarly wisdom now holds, *pace* Strauss, that the framers of the Fourteenth Amendment likely intended at least some (if not all) of the Bill of Rights to be protected. *See, e.g.,* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

49. For a list of states having public accommodations statutes that include sexual orientation as a protected class, see Elizabeth R. Cayton, Comment, *Equal Access to Health Care: Sexual Orientation and State Public Accommodation Antidiscrimination Statutes*, 19 L. & SEXUALITY 193, 195 n.15 (2010).

50. *See* Strauss, *The Irrelevance of Constitutional Amendments*, *supra* note 7, at 1484.

51. Denning & Vile, *supra* note 12.

But I am aware of few originalist scholars who believe that the Court must apply original understanding in an unmediated form. Or who believe that that original understanding is a kind of judicial algorithm that produces answers to contemporary constitutional controversies. Strauss certainly does not name one—a silence facilitated by the lack of footnotes or a list of sources at the end of the book.

Strauss's crabbed description of originalism ignores the outpouring of recent literature expressing a variety of views on what counts as sources of meaning for ascertaining the original understanding of constitutional provisions.[52] In contrast to earlier originalist theories that seemed to privilege the views of the Framers,[53] much recent originalism scholarship endorses what it terms "the original public understanding," based on, among other things, contemporary usage, in addition to the usual sources, such as the records from the Philadelphia Convention, state ratifying conventions, the records of the Reconstruction Congress, and the like.[54]

His insistence that originalists expect specific answers to contemporary constitutional questions similarly elides the distinction between the fixing of constitutional meaning and the extrapolation of doctrinal rules implementing that meaning—between what Mitchell Berman has termed "constitutional operative propositions" and "decision rules."[55] Take the Equal Rights Amendment as an example. Strauss claims that no understandings emerged in the debates over that amendment on questions such as whether the ERA would outlaw single-sex education.[56] For Strauss, this "proves" that originalism is unworkable because history often fails to provide ready-made answers to controversies that arise later. Leaving aside for a moment whether "understandings" about the ERA materialized or not,[57] Strauss is conflating the use of originalism to fix

52. For a good, if critical, summary, see Mitchell Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

53. For a clever critique of this earlier originalism, see Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235 (1989).

54. *See generally* Symposium, *Original Ideas on Originalism*, 103 NW. U. L. REV. 491 (2009).

55. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004); *see also* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005); *see generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

56. *See supra* note 9 and accompanying text.

57. The evidence suggests that understandings *did* emerge that the results Strauss

constitutional meaning and the *implementation* of that meaning through judicial doctrine. As Mitchell Berman has demonstrated, however one arrives at constitutional meaning, there is still a second step in which courts have to fashion tools that enable judges to use that meaning in the resolution of specific cases.[58] Even provisions with self-evident meaning (e.g., Presidents must be at least thirty-five years old[59]) cannot be directly applied—courts have to apply some decision rule specifying whether the age threshold has been met.[60] Few originalists would claim that to fashion doctrinal rules to render original understanding useful is to abandon original understanding.[61]

Strauss's claim that originalists are committed to the Framers' specific applications of their principles is also false. As Mitchell Berman notes in an article otherwise harshly critical of originalism, "the only commentators who take [original application originalism] seriously are those aiming to attack it. Leading originalists have unambiguously repudiated it for years."[62]

To be fair, Strauss confesses to presenting an unnuanced picture of originalism (pp. 10–11), defending his presentation on

mentions were possible under the ERA, and that possibility played a significant role in its eventual defeat. *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995 at 410–11 (1996) (discussing the concerns raised by opponents of ERA regarding, inter alia, unisex bathrooms and assurances provided by supporters that the ERA would not have mandated such things); RICHARD B. BERNSTEIN WITH JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 142–43 (1993) (describing "insistent repetition of alleged horrors that ERA, interpreted by an 'ultra-liberal' Court, might foster: drafting women into combat forces, unisex bathrooms, homosexual marriages, and the like. . . . [T]he parade of horribles . . . tainted ERA beyond repair").

58. Further, it is hard to see that CLCI is a marked improvement on this score. After all, the common law method requires judges to extract principles from a case or group of cases for prospective application. *See supra* notes 28–44 and accompanying text.

59. U.S. CONST. art. II, § 1.

60. Berman says that the default rule is "preponderance of the evidence." Berman, *supra* note 55, at 11, 68.

61. Randy Barnett, who is an originalist, has likewise distinguished between constitutional "interpretation" and constitutional "construction," which describes roughly the same distinction between fixing meaning and operationalizing that meaning through judicial doctrine. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–30 (2004). Even older originalists, like Robert Bork, recognized that "'most doctrine is merely the judge-made superstructure that implements basic constitutional principles'" and was in no way inconsistent with originalism. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 167 (1990) (quoting Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (en banc) (Bork, J., concurring)).

62. Berman, *supra* note 52, at 28.

the grounds that with originalism, it's all or nothing. Some practitioners, he notes, "actually define 'original meaning' in a way that ends up making originalism indistinguishable from a form of living constitutionalism" (pp. 10–11).[63] Strauss argues that those, like Justice Scalia, who declare themselves to be "fainthearted originalist[s]," and would, for example, permit well-entrenched precedent to trump original understanding, are not really originalists either and that such concessions are fatal to originalism (p. 17). Strauss writes, "if following a theory consistently would make you a nut, isn't that a problem with the theory?" (p. 17). The problem with soft originalism "is that it gives away most of the qualities that purported to make originalism appealing in the first place," like the constraint of individual discretion (p. 17). If you concede you would abandon it sometimes, then questions arise: "When?" and "What do you employ instead of originalism?" He writes that "[t]he challenge . . . is to answer these questions without making yourself vulnerable to the same objections that are routinely leveled against living constitutionalism: when push comes to shove, you're just going to do what seems right to you, instead of following the law" (p. 17).

But this objection can be turned back on CLCI itself. For example, in Chapter 5 Strauss concedes that it is at times good and right that we follow text or original understanding. Yet, he does not suggest that his concession is fatal to his theory or makes him any less committed to CLCI. Moreover, those like Justice Scalia who admit a willingness to abandon originalism on occasion do so in the name of *stare decisis*, something one would think Strauss would applaud given both his fears that originalism would result in all the terrible things he lists in Chapter 1 as well as his belief that it's good for the Court to follow precedent. Originalism, like the Constituton itself, need not be a suicide pact.

D. ON THE UNDESIRABILITY AND IMPOSSIBILITY OBJECTIONS

Strauss's main objections to originalism—that it is both undesirable and impossible—are both overdrawn and even contradict one another. First, if the Framers' intentions are truly unknowable, then it makes no sense to indict originalism on consequentialist grounds as he does in Chapter 1.[64] The

63. *See supra* note 4 and accompanying text.
64. *See supra* Part I.A.

normative argument that originalism would produce undesirable results must assume that those are, in fact, outcomes produced by the original understanding. But if original intent or original understanding is beyond the grasp of scholars, lawyers, and judges, then no such outcomes are possible or plausible.

Strauss also cites the dead-hand objection as another of originalism's normatively undesirable consequences. But I'm not sure I really understand this objection. Adhering to precedent seems to involve no less of a submission to the past than adherence to the original understanding of constitutional provisions. We obey statutes that were written a long time ago as well. Strauss distinguishes *stare decisis* from originalism by claiming proponents of the latter do so out of quasi-religious or mystical ancestor worship, while he would respect precedent on pragmatic grounds. But adherents of originalism, no less than proponents of CLCI, could similarly ground their theory.

Originalists might claim that it makes sense to resolve the tension between judicial review and democracy by curbing judicial discretion in exercise of the former by hewing closely to the original understanding of constitutional provisions. That way, the argument runs, you can be sure that you enforce the Constitution while reducing the instances of interference with policy choices made by elected officials. No mystical or quasi-religious veneration is required! The only requirement is just a belief that Article VI's reference to "*this* Constitution" means the one written and ratified in 1789 (or 1791 or 1868), not what one wishes it meant or would like it to mean today. Moreover, since Strauss himself concedes that it is sometimes necessary or useful to follow text, his dead-hand objection could be expanded to condemn constitutionalism in toto. To the extent it does, it surely proves too much, as Madison himself pointed out to Jefferson, who thought constitutions ought to expire every generation or so.

As for the impossibility critique: saying that recovery of original understanding is impossible is a pretty radical attack on the historical enterprise. What Strauss really means is that it is impossible for *lawyers and judges* to do so, which might be recast as an institutional competence objection. Granted, most lawyers and judges are not trained historians, but that does not mean either that (1) their efforts to do history are designed to hide policy preferences, or (2) that CLCI is superior because it "requires judges and lawyers to be, well, judges and lawyers" (p. 43).

Strauss also objects that were original understandings within our capabilities, they would still not help, because they don't answer the questions that come up in litigation. As noted above, this collapses any distinction between constitutional meaning and the doctrinal rules to implement that meaning, denies that the formulation of doctrinal rules is compatible with originalism, or both. Moreover, CLCI is hardly an improvement. Knowing that *Griswold v. Connecticut* held that states could not prohibit married couples from using contraceptives tells a court nothing about the state's ability to prohibit the *sale* of contraceptives to *un*married persons,[65] or whether the state can regulate the sexual morality of its citizens.[66]

E. COMPARING CLCI AND ORIGINALISM

It is difficult to tell whether CLCI is more workable than originalism, because it is not clear, exactly, what CLCI involves. Saying that it allows lawyers and judges to be lawyers and judges is, of course, tautological. Similarly, if you reject the Jeffersonian "dead hand" argument—or at least if you fail to see why precedent is not as subject to that argument as originalism, you might question whether CLCI is clearly superior on justifiability as well.

On descriptive superiority, however, Strauss seems to be on stronger ground. There is no doubt that most Supreme Court opinions on constitutional questions do not start—and have not started—by reasoning from originalist first principles. Opinions like *District of Columbia v. Heller*[67] are the exception, rather than the rule. More common are opinions like the ones in, say, *Gonzales v. Raich*,[68] in which the majority and the dissenting opinions jousted over which precedents were most relevant to the resolution of the issue before the Court. And Strauss is certainly correct that First Amendment doctrine has moved

65. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

66. *Compare* Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring), *and id.* at 505 (White, J., concurring) (assuming that it can), *with* Lawrence v. Texas, 539 U.S. 558, 571, 577 (2003) (holding that morality alone is an insufficient justification for regulating consensual same-sex sexual activity).

67. District of Columbia v. Heller, 554 U.S. 570 (2008) (holding that the Second Amendment guarantees an individual right to private gun ownership for self-defense; invalidating the District of Columbia's gun control ordinance that made illegal ownership of a handgun for self-defense).

68. Gonzales v. Raich, 545 U.S. 1 (2005) (sustaining the application of the Controlled Substances Act to non-commercial, locally-grown possession and consumption of marijuana for medical purposes, as permitted by state law).

afield of the Framers' likely intended application of the Amendment.[69] Still, "ought" does not necessarily follow from "is." It still remains to be proven that CLCI produces better or more accurate results over the run of cases, according to some measure, than originalism does.[70]

I have my doubts whether CLCI would result in more candid opinions as well. Perhaps the common law method would be an improvement if judges would signal that lines of precedent did not control, or were in tension, and thus a decision would be made according to notions of fairness and good policy. But I cannot think of a majority Supreme Court opinion on a contentious issue that has said so. More common are disingenuously broad readings of cases that ignore limiting language or, conversely, parsimonious readings that Llewellyn mocked as announcing a principle that applies only to red-headed Walpoles driving pale magenta Buicks. Seeing such behavior, I am occasionally as inclined to view case law as a fig leaf for a preferred outcome as Strauss is suspicious of the "law office" history allegedly accompanying originalist opinions. At the very least, it is rarely clear which precedents control, particularly when lines of precedent are in tension with one another, if they don't flatly conflict.

CONCLUSION

The Living Constitution is written for a general, not a specialized, audience. I would highly recommend it as an antidote to some simplistic popular critiques of the Supreme Court. As is his hallmark, Strauss's writing is clear and concise. His logic and argumentation are downright seductive.

However, the verdict on CLCI as an, or *the*, alternative contender to theories of original understanding will have to await a more complete treatment. I close with three suggestions for that future work. First, a more precise description of the common law method is essential. Strauss seems to assume that there is only one such method and that lawyers will, to coin a phrase, "know it when they see it." But metaphors involving evolution and talk of the wisdom of the ages obscure the myriad choices that judges have when framing issues, choosing among

69. *See supra* notes 12–15 and accompanying text.

70. For doubts about the ability of CLCI to deliver on its epistemic claims, *see* VERMEULE, *supra* note 18.

lines of relevant precedent, synthesizing those precedents in that line into legal principles, and applying those principles.

Second, I agree with Adrian Vermeule that the judicial supremacy on which CLCI depends demands a stronger defense. Why is it that courts, the Supreme Court in particular, are institutionally capable of identifying, transmitting, and updating high constitutional principles? Why is it not fatal to the common law analogy that common law courts were subject to reversal by legislatures?

Finally, Strauss should eschew the straw man originalism invoked in *The Living Constitution* in favor of the original understanding theories that scholars actually propound. He should at least be able to cite originalist scholars who subscribe to a version of originalism that, for example, expects history to dictate the precise outcomes of current cases.